



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

8.11.3

APRIL 24, 2019

## EFFECTIVE DATE

(04-24-2019)

## PURPOSE

- (1) This transmits revised IRM 8.11.3, *Appeals Penalties, Return Preparer Penalty Cases*.

## MATERIAL CHANGES

- (1) Revised IRM 8.11.3 to incorporate Interim Guidance Memorandum AP-08-0418-0006, *Initial Conference Procedures for Liability, Penalty Appeals and Innocent Spouse Cases*, dated April 23, 2018. This guidance consolidates initial case actions taken at different times to allow Appeals Technical Employees to validate case data when they start a substantive review of the case.
- (2) This IRM has been updated to add new IRM 8.11.3.1 Program Scope and Objectives and its related subsections to comply with the Deputy Commissioners of Services and Enforcement and Operations Support memo dated September 14, 2016, entitled *Heightened Awareness, Sensitivity, and Understanding of Internal Controls*.

## EFFECT ON OTHER DOCUMENTS

This guidance supersedes IRM 8.11.3, *Appeals Penalties, Return Preparer Penalty Cases*, dated February 17, 2015.

## AUDIENCE

Appeals employees

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8.11.3

Return Preparer Penalty Cases

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8.11.3.1  
(04-24-2019)  
**Program Scope and Objectives**

- (1) Purpose: This IRM section describes the process and procedures for working Return Preparer Penalty cases in Appeals. Return Preparer Penalty cases originate from Small Business/Self Employed (SB/SE) Campus and Area, Large Business and International (LB&I) and Tax Exempt and Government Entities (TE/GE) Divisions. These penalties are included within Chapter 68, Subchapter B, *Assessable Penalties*, and are not return related penalties. They are not subject to deficiency procedures.
- (2) Audience: Appeals Technical Employees
- (3) Policy Owner: Appeals Technical Guidance is under the Director, Specialized Examinations Programs and Referrals.
- (4) Program Owner: Appeals Technical Guidance is the program office responsible for technical and procedural guidance to the Appeals organization and is under the Director of Technical Guidance.
- (5) Contact Information: Appeals employees should follow established procedures on *How to Contact an Analyst*. Other employees should contact the Product Content Owner shown on the Product Catalog Information page for this IRM.

8.11.3.1.1  
(04-24-2019)  
**Background**

- (1) This IRM adheres to Penalty Policy Statement, P-20-1 which addresses fair and equitable implementation and application of penalty provisions and requires all Service functions to develop procedures that promote:
  - Consistency in the application of penalties compared to similar cases
  - Unbiased analysis of the facts in each case; and
  - The proper application of the law to the facts of the case.
- (2) Appeals accomplishes this mission by considering protested and Tax Court cases, holding conferences, and negotiating settlements in a manner which ensure Appeals employees act in accord with the Taxpayer Bill of Rights (TBOR) in every interaction with taxpayers. See IRC 7803(a)(3). See Pub 5170, *Taxpayer Bill of Rights*. For more information, see IRM 8.1.1 *Appeals Operating Directives and Guidelines*.

8.11.3.1.2  
(04-24-2019)  
**Authority**

- (1) This IRM is supplemental guidance to IRM 20.1.6, *Penalty Handbook, Preparer, Promoter, Material Advisor Penalties*, and outlines the procedures for working Return Preparer Penalty cases by Appeals Technical Employees. The IRS has penalty and injunctive authority to address improper tax return preparation and abusive transaction promoters. The Internal Revenue Code (IRC) contains penalties to stop fraudulent, unscrupulous, and/or incompetent tax return preparers, abusive transaction promoters, and material advisors who fail to furnish information or maintain lists with respect to reportable transactions. Penalty assertion is one enforcement vehicle for noncompliant return preparers, promoters, and material advisors.

8.11.3.1.3  
(04-24-2019)  
**Responsibilities**

- (1) The Director, Case and Operations Support (C&OS) is the executive responsible for designing, developing, delivering, and monitoring short-and-long-range tax administration policies, programs, strategies, and objectives for the Appeals organization.
- (2) The Director, Policy, is responsible for providing technical and procedural guidance to Appeals employees, establishing and maintaining policies and standard procedures for Appeals work streams.

- (3) The Policy analyst shown on the Product Catalog page as the originator is the assigned author of this IRM.

8.11.3.1.4  
(04-24-2019)

#### Program Reports

- (1) Planning, Quality, and Analysis (PQ&A) provides trends and data analyses and detailed summary reports for Appeals.

8.11.3.1.5  
(04-24-2019)

#### Terms and Acronyms

- (1) See IRM 8.1.1-1 Exhibit, *Common Terms Use in Appeals* for common terms and definitions use in IRM Part 8. Terms listed in the exhibit are not included in the table.

- (2) The table lists commonly used acronyms and their definitions:

Acronym	Definition
SB/SE	Small Business/Self-Employed
LB&I	Large Business and International
TE/GE	Tax Exempt and Government Entities
FEATRCOD	Feature Code
ACI	Appeals Coordinated Issue
STATDATE	Statute Date
STATCODE	Statute Code
ACIcc	Appeals Coordinated Issues, Category of Case
OPR	Office of Professional Responsibility
EITC	Earned Income Tax Credit

8.11.3.1.6  
(04-24-2019)

#### Related Resources

- (1) This IRM is related to IRM 20.1.6, which provides information regarding the servicewide preparer, promoter, and material advisor, penalties, policies, and procedures. It serves as a supplemental procedural guide for Appeals Technical Employees.

8.11.3.2  
(10-01-2012)

#### Return Preparer Penalty Overview

- (1) This section addresses the procedures for return preparer penalties considered by Appeals. Return preparer penalties are imposed against the person or business that prepared a return.
- (2) The penalties discussed in this section are penalties proposed under:
- IRC 6694, Understatement of Taxpayer's Liability by a Tax Return Preparer, and
  - IRC 6695, Other Assessable Penalties with Respect to the Preparation of Tax Returns for Other Persons, and
  - IRC 6713, Disclosure or Use of Information by Preparers of Returns.

8.11.3.2.1  
(04-24-2019)  
**Return Preparer  
Penalties Under IRC  
Section 6694**

- (1) The definition of a tax return preparer for purposes of Sections 6694 and 6695 is provided in IRC 7701(a)(36) and Treasury Regulation 301.7701-15.
- (2) IRC 6694 penalties can only apply if there is an understatement of tax liability.
- (3) The IRC 6694(a) penalty is the greater of \$1,000 or 50% of the income derived (or to be derived) by the tax return preparer with respect to each return, amended return or claim for refund prepared if there is an understatement on the return or claim due to an unreasonable position taken on the return or claim that the preparer knew or reasonably should have known about. A position is unreasonable if:
  - a. There was not substantial authority for the position and the position was not disclosed.
  - b. The position was disclosed but there was not reasonable basis for the position.
  - c. The position is with respect to a tax shelter or reportable transaction under IRC 6662A and it is not reasonable to believe the position will be more likely than not sustained on the merits. See Notice 2009-5, 2009-3 I.R.B. 309. Refer to IRM 20.1.6.4.10, *Tax Shelters and Reportable Transactions*, for additional guidance on the application of IRC 6662A.
- (4) The IRC 6694(b) penalty is the greater of \$5,000 or 75% of the income derived (or to be derived) by the tax return preparer with respect to returns, amended returns, and claims for refund prepared for taxable years ending after December 18, 2015. The penalty may be imposed against a tax return preparer if:
  - a. There is an understatement of liability, on a return or claim for refund prepared by the preparer, which is due to a willful attempt in any manner to understate the tax liability by the preparer, or
  - b. The preparer has recklessly or intentionally disregarded rules or regulations.
- (5) Reduce the IRC 6694(b) penalty by the amount of the IRC 6694(a) penalty if both the IRC 6694(a) and (b) penalties are asserted against the preparer on the same return or claim.
- (6) Because the IRC 6694(b) penalty involves willfulness, there is no statutory period for assessment of this penalty. On tax return preparer penalties asserted under section 6694(a) and 6695, the three year statute of limitations for assessment begins to run on the filing date of the return or claim for refund. The statute of limitations on assessment for the section 6694(a) and 6695 penalties may be extended using a Form 872-D, *Consent to Extend the Time on Assessment of Tax Return Preparer Penalty*. IRC 6696(d) addresses periods of limitation.
- (7) Refer to IRM 20.1.6.4, *IRC 6694 Understatement of Taxpayer's Liability by Tax Return Preparer*, for additional information.
- (8) These penalties are generally processed under the pre-assessment penalty procedures.

8.11.3.2.2  
(09-24-2013)

**Preparer Penalties  
Under IRC Section 6695**

- (1) The return preparer penalties under IRC 6695 are assessed against preparers who:
  - a. Fail to provide the taxpayer with a copy of the return, as required under IRC 6107(a), \$50 per failure, up to a maximum of \$25,000 for each calendar year, per IRC 6695(a),
  - b. Fail to sign the return, \$50 per failure, up to a maximum of \$25,000 for each calendar year, per IRC 6695(b),
  - c. Fail to provide an identifying number, as required under IRC 6109(a)(4), \$50 per failure, up to a maximum of \$25,000 for each calendar year, per IRC 6695(c),
  - d. Fail to retain a copy of the return or a list of returns prepared, as required under IRC 6107(d), \$50 per failure, up to a maximum of \$25,000 for each return period, per IRC 6695(d),
  - e. Fail to file a tax return preparer information return or set forth an item in the return as required under IRC 6060, \$50 for each failure, up to a maximum of \$25,000 for each return period, per IRC 6695(e),
  - f. Negotiate a refund check or misappropriate a refund via electronic means, \$500 per failure, per IRC 6695(f), or
  - g. Fail to be diligent in determining eligibility for the Child Tax Credit, American Opportunity Tax Credit, or the Earned Income Tax Credit, \$500 per failure per IRC 6695(g).
- (2) These penalties are generally processed under the pre-assessment penalty procedures.
- (3) Refer to IRM 20.1.6.5, *IRC 6695 Penalties That May Apply to a Tax Return Preparer*, for additional information.

8.11.3.2.3  
(09-24-2013)

**Return Preparer  
Penalties Under IRC  
Section 6713**

- (1) The penalty under IRC 6713 is assessed against preparers who:
  - a. receive compensation for preparing a tax return, or engage in the business of preparing or providing services in connection with the preparation of tax returns; and
  - b. disclose any information furnished to him or her in connection with the preparation of any return; or
  - c. use any information furnished to him or her for any purpose other than to prepare or assist in preparing the taxpayer's return. The same exceptions set forth in IRC 7216(b) apply to IRC 6713.
- (2) The penalty is \$250 for each disclosure or use, up to a maximum of \$10,000 for each calendar year.
- (3) These penalties are generally processed under the pre-assessment penalty procedures.
- (4) Refer to IRM 20.1.6.7, *Penalty for Unauthorized Preparer Disclosure or Use - IRC 6713*, for additional information.

8.11.3.3  
(04-24-2019)

**Origin of Return  
Preparer Penalty Cases**

- (1) Small Business/Self Employed (SB/SE) Campus and Area, Large Business and International (LB&I) and Tax Exempt and Government Entities (TE/GE) Divisions are responsible for identifying tax returns to which return preparer penalties apply. See IRM 20.1.6.4, *IRC 6694 Understatement of Taxpayer's Liability by Tax Return Preparer*, for detailed procedures.



- (2) Some penalties are related to positions taken or items reported on underlying tax returns (the related tax return). In general, if there is an unagreed related income tax case, the unagreed preparer penalty case will not be sent to Appeals before the related tax case is submitted to Appeals. Examination will include in the preparer case file information on the current status and location of the related return.
  - a. IRC 6694, IRC 6695, and IRC 6713 penalties generally have pre-assessment appeal rights. Refer to IRM 20.1.6.19.1, *Pre-Assessment Appeals IRC 6694, IRC 6695, IRC 6707A, and IRC 6713*.
  - b. A preparer conduct penalty may not be submitted to Appeals if there are less than 365 days remaining on the statute of limitations. If the Appeals Technical Employee (ATE) returns the case due to new evidence or new issues, there must be 210 days remaining on the statute of limitations at the time the case is received by Examination. When these cases are returned to Appeals, there must be 180 days remaining on the statute of limitations.
  - c. If the statutory period for assessment of the IRC 6694(a) penalty is about to expire and the taxpayer will not agree to an extension, Compliance assesses the penalty.
  - d. Examination sends the preparer Letter 1125, which provides the preparer with information on appeals rights.
  - e. If there is no response to the letter, the penalty is assessed.
- (3) Provide the preparer, upon request, the same appeal rights post-assessment as would have been provided if the appeal was received in a pre-assessment status.

8.11.3.4  
(09-24-2013)  
**Receipt of Preparer  
Penalty Cases**

- (1) Refer to IRM 8.20.5.31.1.1, *Return Preparer Penalty (RPP) Cases Carding*, for APS carding procedures.
- (2) All return preparer penalty work units are controlled on ACDS (Appeals Centralized Database System).
- (3) Appeals Technical Employees should review the case summary card for accuracy. Preparer penalties are established on ACDS the same way as other penalty appeal cases except for the following:
  - **TYPE** = 6694A, 6694B or 6695 (These are code sections and will be identified on the Form 8278 under column (a).) 6713 will be "OTHPEN."
  - **MFT** = 55 for individual, 13 for business (also found on Form 8278)
  - **FEATRC**D (Feature Code) = **AI** Appeals Coordinated Issue except 6713
  - **STATDATE** (statute date) or **STATCODE** (statute code) = If the penalty is assessed enter the statute code ASESD. If the penalty is not assessed, see the table below.

Type	STATDATE (statute date)	CODE (statute code)
<b>6694A</b>	3 years from the filing of the return or claim for refund. Use the earliest ASED if there is more than one statute date.	Blank
<b>6694B</b>	Blank	<b>6694B</b> – Penalties under IRC 6694B do not have a statute of limitations for assessment.
<b>6695</b>	3 years from the filing of the return or claim for refund. Use the earliest ASED if there is more than one statute date.	Blank
<b>OTHPEN for 6713</b>	Blank	<b>6713</b> – Penalties under IRC 6713 do not have a statute of limitations for assessment.

- (4) Treat the case as one work unit when multiple returns are involved in a preparer penalty case.

**Example:** IRC 6694(a) is proposed against a preparer on 10 returns that were prepared. The case will appear as one work unit number under the preparer's TIN.

#### 8.11.3.5 (09-24-2013)

##### Return Preparer Penalties as Appeals Coordinated Issues (ACI)

- (1) Return preparer penalty issues were re-designated as Appeals Coordinated Issues, Category of Case (ACIcc) on August 28, 2011. Review and concurrence is no longer required before finalizing any resolution for a return preparer penalty.
- (2) Appeals employees having a work unit with a return preparer penalty issue must make a referral to Domestic Operations through their manager upon assignment or preliminary review using Form 13381, *Appeals Technical Guidance Referral*.

**Note:** Return preparer penalties under IRC 6713 are not coordinated and a referral should not be made.

- (3) Refer to the "Domestic Ops" tab on the Appeals Website <http://appeals.web.irs.gov/lbsp/default.htm> for list of Technical Specialists.

#### 8.11.3.5.1 (04-24-2019)

##### Consideration of Return Preparer Cases

- (1) Differences in preparer penalty cases.
  - a. Penalties under sections 6694, 6695, and 6713 are not subject to deficiency procedures.
  - b. Use Closing Codes 14, 15, or 16 which refer to whether penalties have been sustained or abated rather than cases closed "agreed" or "unagreed."

- c. Use Closing Code 20 for all premature referral cases.
  - d. There is no required “agreement form” for return preparer penalties, nor is one required to assess the penalty and close the case. The only way to enter into a binding agreement would be a Form 906, *Closing Agreement*.
  - e. When Appeals sustains or partially sustains a pre-assessment return preparer penalty, the return preparer can still file a claim, and if disallowed, can come to Appeals again in post-assessment status.
- (2) Upon receipt of the case, the Appeals Technical Employee (ATE) must follow the procedures outlined in IRM 8.11.1.2.6, *New Receipt Procedures for Appeals Technical Employees*. This includes, but is not limited to the following:
- Determining the statute of limitations and validating the statute-related fields on ACDS within 45 calendar days of receipt of a newly assigned and/or transferred case (i.e., date of CR/NR) in accordance with IRM 8.11.1.2.6 (1) and IRM 8.21.3, *Appeals Technical Employees Statute Responsibility*.
  - Validating the Case Summary Card (CSC) information and making updates, if necessary, in accordance with IRM 8.11.1.2.6 (2). Refer to IRM 8.11.3.4 for fields pertaining to return preparer penalty cases.

**Note: The statute verification time frame shall not be extended beyond 45 days.**

- (3) Consideration of the penalty case will include an analysis of the litigating hazards. See IRM 8.11.1.2.7.5, *Hazards of Litigation*.
- (4) Process return preparer penalties as follows:
- a. Use Form 8278, *Computation and Assessment of Miscellaneous Penalties*, to process the request for Assessment/Adjustment/Abatement.
  - b. Use the customized Form 5402, *Appeals Transmittal and Case Memo*, as the transmittal document for all preparer penalty cases.
  - c. Use closing Letter 1342 with addendum, for cases where a penalty is sustained or partially abated. This letter describes the procedures for filing suit with district or claims court.
  - d. Use closing Letter 5011 for cases where the penalty is conceded in full.
- (5) Refer all IRC 6694(b) preparer penalties **asserted** by Appeals against an attorney, certified public accountant, enrolled agent or enrolled actuary, to the Office of Professional Responsibility (OPR). See IRM 8.10.2.1.2.2, *Reports to Outside Officials*, for procedures on reports to the Office of Professional Responsibility and IRM 20.1.6.12.3, *Referral to the Office of Professional Responsibility*.
- (6) ATEs should exercise discretion in making referrals to OPR for other return preparer penalties. Referrals of asserted IRC 6694(a) and/or IRC 6695(a) through (g) penalties to OPR should be based on a pattern of behavior or penalties across multiple taxpayers, tax issues or tax years.

8.11.3.6  
(09-24-2013)  
**Closing Procedures for  
Return Preparer Penalty  
Cases**

- (1) Refer to IRM 8.20.7.13.3, *Return Preparer Penalty Closing Procedures*, for APS closing procedures.
- (2) Preparer penalties are closed the same as other penalty appeals with the following additions:

- a. Form 5402, *Appeals Transmittal and Case Memo*, will be included in the closing package. It should include information on the revised penalty amounts needed to update ACDS.
  - b. Form 8278 will be included and will require processing.
- (3) The following closing codes apply:

Determination Made	CLOSINGCD
<b>Sustained</b> (penalties are not removed)	14
<b>Abated</b> (penalties are fully removed)	15
<b>Partially Abated</b> (only part of penalties are removed)	16
<b>Premature Referral</b> (case returned to Examination)	20

- (4) APS will assess or abate penalty per the ATE prepared Forms 5402 and 8278 instructions.
- a. Penalties are assessed using TC 240 and the applicable reference code.
- (5) If closing a case as a premature referral that contains an IRC 6695(g) penalty, the ATE will advise APS to return the case to the appropriate EITC coordinator by notating this in the other remarks section of the Form 5402. The list of EITC coordinators can be found at <http://mysbse.web.irs.gov/exam/tip/rp/contacts/12536.aspx>.